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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

LOREN SPECIALTY MFG. CO., INC.,

Petitioner,

vs.

THE CLARK MANUFACTURING COMPANY,
ROBERT F. GLEASON,
ARNOLD A. HANSON.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Loren Specialty Mfg. Co., Inc., prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered May 2, 1966, which affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and its subsequent order denying rehearing.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is reported in 360 F.2d 913 and the opinion of the District Court in 241 Fed. Sup. 493. Both opinions are printed in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1966, and an order denying a rehearing was entered on June 9, 1966. Jurisdiction of this Court is invoked pursuant to title 28 U.S.C. 1254-(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where title to merchandise is transferred for a consideration, does the transaction qualify as a sale under the Robinson-Patman Act even though, by arrangement between the buyer and seller, title is transferred to a third person and the buyer never takes title?

2. May a litigant in a Federal Court sitting in Illinois escape the consequences of admissions against interest made in his pleading by filing an amended pleading without any affidavit or testimony under oath to establish that the admissions were made under a misapprehension or by mistake?

3. Under what conditions if any, may an admission against interest, which is an interpretation of business transactions, made in a pleading signed by the litigant's attorney, be withdrawn after six years.

4. If a litigant in a Federal Court files a pleading making admissions against interest and later files an amended pleading, must his opponents, in order to rely upon the admissions, offer the original pleading in evidence, or should the Federal Court take judicial notice of the admission in the original pleading?

STATUTES INVOLVED

The Robinson-Patman Act (15 U.S.C.A. § 13 (a) (A. 1a).

STATEMENT OF THE CASE

This is a treble damage action based on price discrimination prohibited by the Robinson-Patman Act (15 U.S.C. §13 (a)). The case was tried in the District Court without a jury and judgment was entered for defendants. The Court of Appeals affirmed the District Court.

Since the defendants' written admissions of the essentials of plaintiff's case contained in the pleadings and other documents play an important role in this case, it is necessary that we summarize pleadings and other written admissions briefly. The summary will develop most of the pertinent facts.

The Complaint (A. 2) filed February 12, 1958, alleged that prior to December 1955, plaintiff (at first Meyer-Ekstrom and later Loren Specialty Mfg. Co., Inc.) as sales representative for Clark, had bought Clark's steam specialties and resold them in the Chicago territory; that in November 1955 Clark appointed Gleason its sales representative in that territory; that Hanson succeeded Gleason as sales representative in March 1957; that while the individual defendants were sales representatives, they purchased its products from Clark and resold them in competition with, and in many instances, to the same purchasers as plaintiff; that Clark sold its products to Gleason and Hanson at lower prices than it sold the same products to plaintiff, and that in consequence plaintiff suffered a loss of sales and profits.

On May 1, 1958, the defendants filed individual answers, all admitting that plaintiff had in fact been Clark's sales

representative (A. 7, 12, 17); admitting that Hanson (A. 12) and Gleason (A. 18) had purchased from Clark at sales representative (lowest) prices, and "may" have sold in competition with, or to the same purchasers, as plaintiff. Clark admitted that it had sold to Gleason and Hanson (A. 13, 14) at sales representative prices and at the same time sold to plaintiff at the (higher) distributor price and claimed that it was without knowledge sufficient to form a belief as to whether Gleason (A. 12, 13) or Hanson (A. 13) sold the products they had purchased from Clark in competition with or to the same purchasers as plaintiff.

In October 1960, in an Answering Memorandum on the Measure of Damages defendants repeated their admissions that Clark had sold to Gleason and Hanson at prices lower than those it charged plaintiff, and that Gleason and Hanson were in fact plaintiff's competitors (A. 21, 22, 23, 25).

In that same Memorandum defendants stated flatly (A. 25):

> "Defendant Clark has never refused to sell to plaintiff, *nor has it in any way competed with it.*" (Emphasis ours).

In January 1963 defendants filed a brief in support of their Motion to Dismiss or for Summary Judgment and in that brief once more admitted that the individual defendants were competing with plaintiff. (A. 27).

In May 1964, pursuant to reservation of rights, counsel for plaintiff approved an order giving defendants leave to file amended answers.

These amended answers were filed six years after the original answers admitting that Gleason and Hanson purchased from Clark and sold in competition with plaintiff. They all categorically deny (A. 29, 33 and 38) that Glea-

son and Hanson purchased from Clark and sold in competition with plaintiff; deny that Clark made any sales to Gleason and Hanson (A. 30, 34, 38); state that Gleason and Hanson had merely solicited orders for Clark on a commission basis; that Clark shipped and billed all orders, that, in short, Clark itself had competed with plaintiff right from the start.

At the trial, before any evidence was taken, plaintiff's counsel called the Court's attention to defendants' admissions of the critical facts in the original answers and their categorical denial of those same facts in the amended answers and asked that the matter "be clarified before we proceed." The Court stated that the record would show what had been filed originally and what the new answers stated and that if there is a conflict "you may call that to my attention" (A. 52, 53). Later plaintiff's counsel read into the record from their original answers the language of defendants' admissions. (A. 370).

During the trial the defendants again reversed their field, contradicted their amended answers and admitted that Clark had in fact sold to Gleason and Hanson. Although they claimed that the volume of such sales was legally inconsequential, they produced no written records showing such volume. Hanson testified he couldn't recall if he had any records showing the volume of his purchases (A. 166), and Gleason testified that although his records were missing, Clark would have copies of invoices showing the amount of its sales to him (A. 102).

Clark did not deny that it had such records, but it neither produced them nor explained its failure to do so.

Defendants made no attempt to explain or justify their denial of the sales which for six years they had admitted. They introduced no evidence on the point and discussed

the matter only when the Court brought it up, for example:

(A. 383)

"The Court: Well, to get back right to the question I asked a long time ago, and that is that if you were doing here what you said you were doing when you first filed your answer in this case and admitted it, you were, in fact, selling to Hanson and Gleason and reselling. That is what you said you were doing.

Mr. Bates: There were such sales, yes, sir.

The Court: All right. But you didn't limit it."

(A. 384)

"The Court: You said they were your customers initially and you said that you were selling to them.

Mr. Bates: Your Honor, there was originally a theory in here of functional discount. Now, we started our here discussing functional discount earlier. A functional discount is one that you pay the customer, if you will, for something he does for you.

Now, on one theory of this case, that could have been advanced."

The evidence taken at the trial established the following additional pertinent facts:

When Gleason was appointed sales representative for Clark, he and Burford, Clark's Vice President, called on Semler, plaintiff's President, and asked that plaintiff continue selling Clark products as a distributor. Semler said he would give it consideration, but was concerned about Gleason competing with plaintiff. Gleason said he wanted plaintiff's cooperation and had no intention of competing. (A. 226, 227). No one then said or even intimated that Clark itself intended to compete with plaintiff.

Later, when Semler found Gleason's then employee, Hanson, selling to plaintiff's customers at plaintiff's cost, and wrote to Gleason complaining about it (PX 14, A. 411) he received no answer and again no one said or even intimated that Clark, and not Gleason, was then selling in competition with plaintiff. None of the defendants ever told plaintiff Clark was competing with plaintiff until 1964, when defendants filed their amended answers.

After Gleason became Clark's sales representative, plaintiff continued its selling efforts as before; called on all classes of customers as before; made no reduction in its sales force and did not pass on its higher costs to its customers.

Defendants testified that Gleason and Hanson, at Clark's direction, called on all classes of customers from the largest to the smallest; that when they received an order they sent it to Clark for shipment direct to the ultimate purchaser and that such orders were shipped and billed by Clark.

Regardless of whether the order was transmitted to Clark by Gleason or Hanson, or sent to Clark by the ultimate purchaser, Clark paid Gleason or Hanson the profit, that is, the difference between the sales representative's cost and the sale price (A. 166). Defendants called this a "commission".

During the 17 months that Gleason was Clark's sales representative, 97% of his total sales were made to plaintiff and plaintiff's former customers and only 3% of Gleason's sales were to customers he originated. During the same 17 months his total sales to customers he originated were $1186.05 (A. 237) an average of $69.77 per month, and 67% of Gleason's sales to former plaintiff's customers were at discounts higher (prices lower) than plaintiff had given them (A. 238).

FEDERAL JURISDICTION

This is an action for treble damages based on price discrimination prohibited by the Robinson-Patman Act (15 U.S.C.A. §13 (a)).

I.

REASONS FOR GRANTING THE WRIT.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE OPINION OF THE DISTRICT COURT CONFLICTS WITH EARLIER INTERPRETATIONS OF THE ROBINSON-PATMAN ACT BY THE COURTS OF APPEALS FOR THE FIFTH AND THIRD CIRCUITS.

Both the District Court and the Court of Appeals in holding that the transactions in question were not sales by Clark to Gleason and Hanson, gave great, if not controlling weight, to the fact that when Gleason or Hanson sent orders to Clark and, at their request, Clark shipped the merchandise direct to the customers, the title to the merchandise did not pass to Gleason or Hanson. The District Court defined a sale in the language of the Uniform Sales Act as "an agreement whereby the seller transfers the property in goods to a *buyer* for a consideration called the price". (Emphasis ours).

That definition fails to include many every day sales in which the title to goods is transferred for a consideration, but in which the title does not pass to the *buyer*. For example, when Brown has an electric razor sent to his friend, Jones, by the department store where Brown has a charge account, although Brown is the buyer, the title goes to Jones because of the arrangement between the store and Brown.

This is a common business practice and the record shows that the defendants were familiar with it. Defendants' Exhibit 1 (A. 414) is a Clark invoice which shows

that the merchandise described was "Sold To" Meyer-Ekstrom Company and "Shipped To" Chicago Tube and Iron Works by Clark. Defendants' Exhibit 2 (A. 415) shows the merchandise "Sold To" Kramer and "Shipped To" Brennan, two examples of sales in which the title did *not* pass to the buyer, nor did possession.

Courts also recognize that the title does not pass to the buyer in all cases. For example in *Erwin* v. *Kelly,* 176 Ill. App. 178, the Court ruled that a transaction involving a shipment of coal by the seller to a person designated by the buyer was a sale *to the buyer,* although (a) the title did not pass to the buyer; (b) the seller billed the customer direct; (c) the seller collected the money; (d) the seller paid the buyer the profit, that is, the difference between the cost and selling price. The following language appears on page 182:

> "That the transaction between the plaintiff and defendants was a sale and not a brokerage transaction we think clear. Neither the use of the words 'or commission' as the alternative of 'profit' in the letter of the defendants to the plaintiff of December 24th, nor the further use of the word 'commission' in that letter and in that of the plaintiff to the defendants of March 4, 1910, alters the actual nature of the transaction, which was a sale by the defendants to plaintiff of certain coal which the plaintiff ordered shipped to his customers. The plaintiff's interest in the sale sprang from the 'profits'—the difference between his buying and his selling price. Nor does the fact that he in effect, apparently for their security, made the defendants his agents to collect the selling price, alter the nature of the transaction."

In *American Can Co.* v. *Bruce's Juices,* 187 F2, 919 (Fifth Circuit 1951) Certiorari dismissed, 342 U.S. 875 (a Robinson-Patman case) the Court of Appeals, undoubt-

edly mindful of the statutory prohibition against discriminating "directly or indirectly" (15 U.S.C.A. 13 (a)) disregarded form in favor of substance and affirmed plaintiff's recovery of treble damages even though there were not two sales at different prices to "competing purchasers". The plaintiff was held to be a competing purchaser even though it had not taken title to the cans in question, and in fact had not purchased them at all. At page 924, the Court said:

> "Moreover, *plaintiff was not bound to purchase* the 3.12 Iscan upon such terms in order *to attain the status of a competing purchaser under the Act* as its failure to do so was directly attributable to defendant's own discriminatory practice". (Emphasis added)

By its decision in *P. Lorillard Company* v. *F. T. C.*, 267 F2 439, the Court of Appeals for the Third Circuit, also rejected the literal, the technical approach in interpreting the Robinson-Patman Act. Unlike the District Court and the Court of Appeals in this case, it refused to rely on the technical rules of contract law, saying on page 443:

> *"Petitioners' argument when analyzed and stripped to its essentials, is basically a plea for reliance upon the technical rules of contract law.* It asserts, in effect, that since it was not a party to the contract between the broadcasting companies and the chain stores, and that since they preceded its contracts with the broadcasting companies, there is nothing illegal or violative of Section 2 (d) in the transactions. *On the other hand the Commission refuses to wear blinders and insists that the series of contracts be viewed as a whole."* (Emphasis ours).

The cited decisions of the fifth and third circuits make it clear that, properly interpreted, the Robinson-Patman Act does not require that title pass to the *buyer* for a transaction to qualify as a sale under the Act.

II.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE OPINION OF THE DISTRICT COURT IS IN DIRECT CONFLICT WITH THE SIXTH CIRCUIT ON THE BASIC POINT OF LAW.

In its Memorandum Opinion the District Court said (A. 432)

> "Although the original answers are superseded as pleadings, the plaintiff can still seek to offer the original answers as admissions; however, *for the Court to consider the originals as admissions, these answers must be offered into evidence, which is not the case here.*" (Emphasis ours).

In support of its ruling the District Court cited *Fruco Const. Co.* v. *McClelland,* 192 F2, 241, 245 (8th Cir. 1951) and *Nisbet* v. *VanTuyl,* 224 F2 66, 71 (7th Cir. 1955) and IV Wigmore Evidence §1067.

We believe that the better rule, especially as applied to the facts and circumstances of this case, is the rule followed by the Sixth Circuit Court of Appeals in *Pennsylvania R. Co.* v. *City of Gerard,* 210 F2 437. (Sixth Cir. 1954) by which that Court considered the admissions in superseded pleadings even though they were not offered in evidence.

That case is factually very similar to the present case since it involves admissions in pleadings which were later withdrawn. It cites as authority two decisions of this Court, which do not involve superseded pleadings.

On page 440 of 210 F.2 the following pertinent language appears:

> "These statements recognize the existence of a public way coincident with the underpass. They were admitted by the city in its answer and reply and the exist-

ence of Mill Street as a public highway stood admitted on the pleadings until the filing of the amended cross-petition. *The fact that the original petition was withdrawn and that these statements were eliminated in the amended cross-petition is immaterial, for pleadings withdrawn or superseded by amended pleadings are admissions against the pleader in the action in which they were filed.* 14 A.L.R. 65-72, and cases cited. Assuming but not deciding that the city could not avail itself of these admissions since it did not introduce the original cross-petition in evidence (14 A.L.R. 89), *we take judicial notice of them as part of the record.* Bienville Water Supply Co. v. City of Mobile, 186 U.S. 212, 217, 22 S. Ct. 820, 46 L.Ed. 1132; DeBearn v. Safe Deposit & Trust Co. supra." (Emphasis ours)

As noted above, the Memorandum Opinion cites IV Wigmore Evidence, §1067, in support of its ruling requiring a superseded pleading to be put into evidence if it is to be used as an admission. An examination of the citation makes it clear that the reason for requiring superseded pleadings to be offered in evidence is to prevent surprise. That reason is wholly absent in this case. Before any evidence was offered at the trial, plaintiff's counsel discussed with the Court defendants' admissions in their answers (A. 52, 53) and during the trial the court discussed the admissions with defendants' counsel (A. 383, 384) therefore there was no chance that the defendants could be taken by surprise when the plaintiff relied upon those admissions, and there was no reason why the Court should not have considered the original answers of the defendants as admissions against interest, binding upon the defendants until they introduced sufficient evidence to overcome them.

III.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE OPINION OF THE DISTRICT COURT IS IN DIRECT CONFLICT WITH A LONG LINE OF DECISIONS BY THIS COURT.

The original answers of the defendants admitted that Clark had sold its products to Gleason and Hanson and that they resold them. Six years later defendants reversed themselves and by amended answers denied that Clark had sold anything to Gleason and Hanson. At the trial defendants again reversed themselves and admitted that Clark had sold to Gleason and Hanson, but this time in effect, entered a plea of confession and avoidance. They confessed the sales, but sought to avoid liability by claiming that the volume of the sales was so small as to be legally inconsequential.

The obvious way to prove defendants' affirmative assertion that the sales volume was so small, was, of course, to introduce defendants' own written records of the sales. This was not done.

Hanson couldn't remember if he had any such records (A. 166); Gleason said his records were missing, but that Clark would have copies of its invoices to him. (A. 102). Clark chose to remain discretely silent on the point. Although it did not deny that it had the records, it did not produce them or explain its failure to do so. The only evidence of the volume of Clark's admitted sales to Gleason and Hanson was the vague verbal testimony of Gleason and Hanson from memory.

Defendants deliberately chose to rely upon the weakest kind of evidence, the memories of two prejudiced witnesses, instead of producing the written evidence from their files. The pertinent legal principle here is as old as

our judicial system and has been stated and applied by this court in innumerable cases, for example, *Interstate Circuit* v. *United States,* 306 U.S. 208, 226,

> "The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony if given, would have been unfavorable to appellants. *The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Clifton* v. *United States,* 4 How. 242, 247, 11 L.Ed. 957. *Silence then becomes evidence of the most convincing character.*
>
> *Runkle* v. *Burnham,* 153 U.S. 216, 225, 14 S.Ct. 837, 840, 38 L.Ed. 694; *Kirby* v. *Tallmadge,* 160 U.S. 379, 383, 16 S.Ct. 349, 350, 40 L.Ed. 463; *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 153, 154, 44 S. Ct. 54, 55, 56, 68 L.Ed. 221; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 111, 112, 47 S.Ct. 302, 305, 306, 71 L.Ed. 560; *Mammoth Oil Company* v. *United States,* 275 U.S. 13, 52, 48 S.Ct. 1, 10, 72 L.Ed. 137; *Local 167* v. *United States,* 291 U.S. 293, 298, 54 S.Ct. 396, 398, 78 L.Ed. 804." (Emphasis ours).

Since the defendants here chose not to produce their sales records, we do not know what they contain. We can be sure, however, that if those records had not been harmful to the defendants' case, they would have been in evidence.

In this state of the record the Court of Appeals held that under 28 U.S.C.A. Rule 52 (a) it could not disturb the lower court's finding that Gleason and Hanson were not purchasers under the Act. The pertinent portion of that rule states that "Findings of fact shall not be set aside unless clearly erroneous". Under the "weak evi-

dence rule of this court quoted above, there can be no doubt that the findings of fact by the District Court are clearly erroneous.

Even if we assume for the purpose of discussion, that the defendants are not bound by the admissions in their original answers, the District Court's finding that Gleason and Hanson were not purchasers under the Act is still clearly erroneous.

At the trial, when the defendants repeated their original admission that Gleason and Hanson had purchased from Clark, it is axiomatic that they could not exculpate themselves from that admission by merely claiming, without proving, that the volume of their purchases was so small as to be legally inconsequential. Defendants not only failed to prove their assertion, but, by not producing pertinent available evidence legally proved the contrary by creating a presumption against themselves. That presumption was greatly strengthened by the background of the *unqualified* admissions in their answers, by their additional admissions in their memorandum (A. 21, 22, 23, 25), by their additional admissions in their brief (A. 27) and by the additional admission of their attorney at the trial (A. 383).

To sum it all up, when the defendants at the trial, admitted Clark's sales to Gleason and Hanson, they had the burden of proving that the sales they admitted were legally ineffective to make them liable under the Robinson-Patman Act. Their efforts to prove the point not only failed, but actually resulted in a presumption against them to the contrary, that is a presumption that the sales were *not* legally inconsequential.

We submit that under the decisions of this court Gleason and Hanson were purchasers under the Robinson-Patman Act and the District Court's findings to the contrary was erroneous beyond any question.

IV.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE OPINION OF THE DISTRICT COURT IS IN CONFLICT WITH ANOTHER DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ON A BASIC POINT OF LAW.

In its Memorandum Opinion the District Court stated (A. 423) that there were two central issues in the case, the first of which was whether there were sales to Gleason and Hanson within the meaning of the Act and disposed of the case on that point alone because it concluded that the transactions between Clark and the individual defendants were part of an agency relationship and not sales to Gleason and Hanson within the meaning of the Act. In arriving at that conclusion the Court ignored the strongest and most convincing evidence in the record.

The problem is one of construction and there are many indicia that may help distinguish a sale from an agency or some other relationship. In a doubtful case it is axiomatic that the strongest evidence is the construction which the parties themselves give to the transaction.

In *Samson Tire and Rubber Co.* v. *Eggleston* (5th Cir. 1930) 45 F2 502, 504, the Court was called upon to determine whether a transaction was a bailment or a sale and laid down the general principle which is almost universally acknowledged as correct.

> "Whether the transaction was a bailment or a sale will not be determined solely by the words employed in the written instrument. Its meaning being doubtful, the Court will look also to the acts and circumstances of the parties, *especially to the construction which they themselves put upon the contract in executing it.*" (Emphasis added).

In the present case the application of the principle is far more strongly indicated than in the ordinary case because the defendants' interpretation of the transactions was not that of laymen, but was undoubtedly made by the attorneys who signed defendants' answers. (A. 9, 15, 19) The defendants admitted in the answers filed by their attorneys that the transactions were sales by Clark to Gleason and Hanson and for more than six years those admissions stood unchallenged while defendants' attorneys made further admissions in their brief and memorandum.

Although defendants knew that title to the merchandise did not pass to Gleason and Hanson, nevertheless they repeatedly interpreted the transactions as sales to Gleason and Hanson and stated flatly (A. 25) that Clark had *never* competed with plaintiff, *i.e.,* that Clark had *never* sold to the ultimate purchasers in competition with plaintiff, as defendants now insist they *always* did. After the passage of six years with the attendant loss of records and memory, defendants should not be permitted to reinterpret the facts to the plaintiff's detriment. Under similar circumstances in the case of *Prouty* v. *Citizens Utility Co.,* 209 F. Supp. 26 (U.S.D.C., D. Vt. 1962) the Court said at page 30:

> "Nor should the defendant at this late hour be permitted to add defenses belatedly thought up. This action was filed May 11, 1956, an Answer was filed by the Defendant June 5, 1956. That Answer could have alleged the defenses now urged. To allow the Defendant now—to raise additional defenses just doesn't make sense or seem to make for good justice. Such practice seems to be frowned on both by the Vermont Supreme Court and the United States Supreme Court. See *Cummings* v. *Connecticut Gen. Life Ins. Co.,* 102 Vt. 351, 361, 148 A484 (1930); *Railway Company* v. *McCarthy,* 96 U.S. 258, 267, 24 L.Ed. 693 (1877)."

V.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE OPINION OF THE DISTRICT COURT IS IN DIRECT CONFLICT WITH THE RULINGS OF THE SUPREME COURT OF ILLINOIS.

The Memorandum Opinion quotes from *Decatur Coal Co.* v. *Clokey,* 332 Ill. 253 (1928) (A. 432). The quoted language recites that when an admission is made in a pleading the Court may *upon a proper showing* permit the pleader to change his pleading to conform to the fact. The Memorandum Opinion did not note that the authority for the quoted statement is the case of *Blakeslee* v. *Blakeslee,* 265 Ill. 48, which estabishes that the defendants did not make a "proper showing". Consider the following language from page 52 of that case:

> "In the original answer filed by appellant she admitted she and appellee were tenants in common and that he was entitled to partition. Appellant contends that this answer is not entitled to be considered and *ought not to prejudice her, because it was withdrawn by leave of court.* Appellant's position, in effect, is, that the answer should be treated as one wherein an admission has been improvidently made and the party making it has been *relieved of its effect by order of the court. This would be true if the order were based upon an affidavit that the admission was made under a misapprehension or by mistake.*" (Emphasis added).

Thus, contrary to the ruling of the District Court, the defendants in the present case could not be excused from their admission under Illinois law because the order was not "based upon an affidavit that the admission was made under a misapprehension or by mistake." The defendants made no affidavits and presented no evidence to explain why, for six years, they admitted the critical facts in their answers and flatly denied them in their amended answers.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court grant its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as prayed herein.

Respectfully submitted,

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APPENDIX

THE ROBINSON-PATMAN ACT.

Sec. 1 (49 Stat. 1526, 15 U.S.C.A. §13) (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from

selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15299 SEPTEMBER TERM, 1965 APRIL SESSION, 1966

LOREN SPECIALTY MFG. CO., INC., an Illinois corporation,
Plaintiff-Appellant,

v.

THE CLARK MANUFACTURING COMPANY, an Ohio corporation, ROBERT F. GLEASON, and ARNOLD A. HANSON,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 2, 1966

Before HASTINGS, *Chief Judge,* DUFFY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Loren Specialty Mfg. Co., Inc., an Illinois corporation, plaintiff, has appealed from an order of the district court in favor of The Clark Manufacturing Company, an Ohio corporation, dismissing plaintiff's complaint.

Plaintiff's suit is for treble damages, based upon alleged violations of 15 U.S.C.A. § 13 (a), commonly known as the Robinson-Patman Act.

From the evidence heard in a trial without a jury, it appears that Clark manufactured steam specialties, also known as fluid controls. It ascertained that, for ten years prior to November 14, 1955, while plaintiff operating as Meyer-Ekstrom was Clark's exclusive distributor in the Chicago area, its Chicago sales lagged, in contrast to its national sales which in the same period were rising.

Clark's sales manager had, beginning in 1952, made specific recommendations to plaintiff to improve sales, which suggestions were rejected.

On November 14, 1955, Clark discontinued plaintiff's exclusive distributorship arrangement and appointed Robert F. Gleason as its Chicago area sales representative, to set up a series of nonexclusive distributorships.

Gleason hired defendant Arnold A. Hanson to supervise the Clark account and, in March 1957, Hanson succeeded Gleason as Clark's representative in the Chicago area.

After plaintiff's exclusive distributorship was terminated, it agreed to continue selling Clark products as a nonexclusive distributor.

When plaintiff was Clark's exclusive distributor, it had bought Clark products at the lowest price available—the distributor price—and in addition had received discounts of 10% and 5% off said price. Thus for Clark products with a list price of $100, plaintiff paid $62.42. It then resold these products to the trade at varying discounts.

After the exclusive distributorship was terminated, plaintiff bought at the regular nonexclusive distributor discount of 27%. No one purchaser was given a lower price. Thus, by the appointment of Gleason as sales representative and the establishment of other nonexclusive distributorships in the Chicago area, plaintiff met competition. For their services as sales representatives, Gleason and Hanson were compensated by commissions on the sales generated in the Chicago area and they received the 10% and 5% override that formerly went to plaintiff.

Plaintiff thereupon claimed that a violation of the Robinson-Patman Act occurred, there allegedly having been a sale of Clark products to Gleason (and Hanson) at a lower price than the discount given plaintiff.

15 U.S.C.A. 13 (a) provides, in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * *.

The burden rested upon plaintiff to show that Clark *sold* its products to Gleason or Hanson. The district court found that they were not purchasers within the provisions of the Act. Under 28 U.S.C.A. rule 52 (a), we are prevented from disturbing this finding, even if we believe it erroneous, which we do not. The sanction of 15 U.S.C.A. § 13 (a) is directed against discrimination in price *between different purchasers.*

That determination disposes of this appeal by plaintiff. The order of the district court is affirmed.

ORDER AFFIRMED.

MEMORANDUM OPINION.
(Filed April 16, 1965)

This is a suit for treble damages based upon alleged violations of the Robinson-Patman Act, 15 U.S.C. § 13 (a) (the Act). The plaintiff, Loren Specialty Mfg. Co., Inc., is an Illinois corporation which acts as sales representative or distributor for various manufacturers that sell in the Chicago area; the plaintiff conducts certain of its business under the trade name of Meyer-Ekstrom Company.

The defendant Clark Manufacturing Company (Clark) is an Ohio corporation which sells its products in the Chicago area, as well as nationally. Clark manufactures steam specialties, such as steam traps, reducing valves, strainers and separators.[1]

The defendant Robert F. Gleason (Gleason) is a citizen of Illinois who transacts business in Illinois under the name of Gleason Equipment Company. In December, 1955, Gleason was appointed by Clark to be its sales representative for the Chicago area.

The defendant Arnold A. Hanson (Hanson) is a citizen of Illinois who transacts business in Illinois under the name of Industrial Process Equipment Company. In January, 1956, Hanson was hired by Gleason to supervise the Clark account, as well as various accounts in allied lines. In March of 1957, Hanson went into business for himself and succeeded Gleason as the Clark representative for the Chicago area.

Plaintiff argues that, while it was the exclusive distributor for Clark in the Chicago area from 1945 to 1955, it

---

[1] Steam specialties, also called fluid controls, are used industrially in connection with transmitting steam or fluids by pipeline.

established relationship with many purchasers of steam specialties who purchased from the plaintiff on a regular basis. While the plaintiff was the exclusive distributor, it received a better price from Clark than any other purchaser in its area. However, when Gleason was appointed, the plaintiff no longer received any discount in excess of the distributors' discount, but Gleason received the distributors' discount and an additional discount. It is alleged that Gleason then sold to the plaintiff's previous customers at the same price which the plaintiff was receiving. For this reason, it is alleged, the plaintiff was not only unable to compete with Gleason, but also Gleason intentionally took away the plaintiff's former customers by giving them the same discount as was being given to the plaintiff.

Plaintiff alleges that the defendants violated the Act because Clark sold its products to Gleason and Hanson at lower prices than Clark charged the plaintiff for the same products. Two central issues arise in this case regarding liability. The first is whether there were "sales" to Gleason and Hanson, within the meaning of the Act, and the second is, if there were "sales," whether the prices charged Gleason and Hanson represented bona fide functional discounts.

The defendants argue that Gleason and Hanson, called sales representatives, acted as agents for Clark in most of the transactions questioned by plaintiff. They further contend that, even if the Court finds that sales took place, the Court should find that Gleason and Hanson were operating at a different competitive level than the plaintiff in Clark's distributive scheme, so that they were not competitors of the plaintiff, within the meaning of the Act.

On the other hand, the plaintiff argues that the transactions involving Gleason and Hanson were sales, if not in form, then in substance; it contends that Gleason and Hanson were competing on the same level by selling to the same customers that bought from the plaintiff before it lost its exclusive distributorship.

This Court has jurisdiction of the plaintiff's suit based upon the anti-trust laws of the United States, 15 U.S.C. §§ 13, 15, and 28 U.S.C. § 1337.

A trial was held by the Court, sitting without a jury, upon the complaint of the plaintiff. This is being written upon the basis of three days of trial, the evidence adduced therein, as well as post-trial briefs and the proposed findings of the parties.

From the evidence, I make the following specific findings of fact:

1. The plaintiff acted as exclusive distributor in the Chicago area for Clark from approximately 1945 to November, 1955. Clark's prices to plaintiff were stated in terms of the list prices minus certain documents; specifically, the plaintiff purchased Clark products at the distributors' discount, less an additional 10 and 5 per cent.

2. While exclusive distributor for Clark, the plaintiff purchased products from Clark and resold them to its customers. The plaintiff sent its orders to Clark, who then billed the plaintiff; Clark would then send the products either to the plaintiff or to the plaintiff's customer, as the plaintiff directed. The plaintiff billed its own customers and assumed all credit risks.

3. On September 19, 1955, Clark terminated its contract with the plaintiff by giving sixty days' notice as provided by the contract between the plaintiff and Clark; in

that letter, Clark offered the plaintiff the opportunity to continue to sell Clark products as a distributor, which the plaintiff accepted.

4. On November 14, 1955, Clark entered into a written agreement appointing Gleason sole sales representative in the Chicago area; the agreement was subject to termination by the notice of either party. The following portions of the agreement are at issue in this litigation:

> "We will sell to you at discounts of 10% and 5% from the price to be paid by distributors as determined by our Schedule LP-6551, -2, -3, and -4 now in effect, or from any revision thereof in effect at the time of receipt of your order. You will resell Clark steam specialties so purchased only at the prices and upon the standard terms established by us, unless you first obtain our written consent to sales at different prices or upon different terms.
>
> "On all orders taken by you and billed by us, and on all other orders received from your territory and accepted by us calling for delivery within said territory during the existence of this arrangement, and as full compensation for all of your obligations hereunder, we will, subject to the provision for division of commissions specified following, pay to you the difference between the net price (without deduction of any cash discount) received by us therefrom and the price at which the same goods could have been purchased by you as specified above."

5. A superseding agreement was entered into by Gleason and Clark on April 2, 1956; the two agreements are essentially the same.

6. Gleason hired Hanson in January, 1956, to supervise his Clark account. In March, 1957, Hanson, operating on his own behalf, succeeded Gleason as Clark's Chicago area sales representative. Hanson and Clark operated under an agreement which is essentially the same as Clark used with Gleason.

7. Under the contract, the sales representative was to promote the sale and use of Clark products. The representative was to the following:

(a) Set up distributors.
(b) Contact specifying engineers and architects,
(c) Contact all potential users, and
(d) Provide service for Clark accounts and products when necessary.

Gleason and Hanson did operate under the terms of the agreement. They called on many potential or present users or sellers of Clark products without regard to whether the customer was a distributor, jobber, retailer, small user, large user, or original equipment manufacturer. They testified that they did not solicit specific orders but merely promoted Clark products by attempting to interest the users and sellers in ordering Clark products. Almost without exception, neither Gleason nor Hanson took an order while at the customer's place of business.

8. After the appointment of Gleason as sales representative, customers' orders were either sent directly to the Clark factory by the customer, or the orders were sent to the sales representative who would forward them to Clark without processing. Clark filled the orders and shipped the goods directly to the customer (or, in some cases where the customer was a distributor, directly to the distributor's customer). Clark billed the customer

directly and assumed all credit risks. At the end of each month, Clark sent the sales representative a statement entitled, "Recapitulation of Commission Paid," and a check for that amount.

9. Neither Gleason nor Hanson were required to carry an inventory of Clark products. Each, however, did purchase certain products from Clark which were used (a) as samples, some of which were given to potential customers, and (b) as a backup stock for distributors or original equipment manufacturers, to enable them to obtain parts more quickly than the parts could be obtained from the Clark factory in Ohio.

10. In December, 1955, Gleason purchased an initial stock of Clark products at a cost of approximately $1,700. Between this time and the time when Hanson succeeded Gleason, Gleason purchased approximately $1,000 worth of additional supplies from Clark. Gleason sold Hanson his remaining inventory, which was worth about $1,000. Subsequently, Hanson sold or gave away this inventory at a rate of not more than $350 a year. Hanson did not purchase more than a nominal amount for his inventory.

11. Except for the initial stock, the approximately $1,000 worth of replacements for inventory which Gleason purchased from Clark, and the nominal purchases which Hanson made, the sales representatives did not take formal title to any Clark products, did not exercise control over any Clark products, and did not pay Clark for any of its products.

12. At the time when the plaintiff was appointed exclusive distributor for Clark, Clark set up certain categories of purchasers to which various discounts could be given. Small users received the least discount, large

users and jobbers received the same discount, which was larger than the small users, discount. The distributor received the largest discount and, in the case of an exclusive distributorship, received an additional 10 and 5 per cent. After the termination of the plaintiff's exclusive distributorship, it received only the distributor's discount. Then Gleason or Hanson received the additional ten and five per cent discount.

Thus, after the appointment of Gleason, if a sale were made directly by Clark to a small user, for instance, Gleason or Hanson would receive compensation in the amount of the difference between the distributor's discount and the small user's discount, as well as their sales representative's discount.

After 1955, while the plaintiff served as a distributor, no one, other than Gleason and Hanson, bought Clark products at a lower price than the plaintiff.

13. After the appointment of Gleason, the plaintiff ceased to be the exclusive distributor and ceased to receive the additional ten and five per cent discount. The classifications of various of the plaintiff's previous customers were changed; some of the plaintiff's previous customers were raised to the status of distributor and were able to purchase at the same discount as the plaintiff.

14. Paragraph 7 of the complaint alleges that Clark sold its products to Hanson and Gleason, who were in competition with the plaintiff. In separate original answers, the defendants admitted that Gleason and Hanson purchased certain products from Clark.

On May 20, 1964, by agreement of the parties and without objection, the defendants were granted leave to file amended answers to the complaint. In the amended answers, the defendants deny that the transactions between

Clark and Gleason, and Clark and Hanson, were sales; the defendants set forth facts which are intended to show that the transactions were based upon an agency relationship.

The above findings of fact are all of the facts which relate to whether the character of the transactions fits within the scope of the Act. I shall determine this issue before considering the defense that any greater discount given to Hanson or Gleason was based upon their economic function.

The Act, 15 U.S.C. § 13 (a), provides, in part, the following:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . ."

Rowe, in his treatise on the Act entitled, Price Discrimination under the Robinson-Patman Act (1962), states the essential jurisdictional elements of the Act:

> "The jurisdictional determination turns on these basic statutory requirements: a discrimination must arise from (A) consummated contemporaneous sales transactions (B) by the same seller to different purchasers, (C) involve 'commodities' of (D) 'like grades and quality,' and (E) occur 'in commerce.'" (At p. 45)

See also, Castlegate, Inc. v. National Tea Co., 34 F.R.D. 221, 229 (D. Colo. 1963). Under the Act, discrimination in price means difference in price. F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 549-50 (1960).

The element of the Act which I must consider is whether and to what extent Clark was a seller to Gleason and Hanson. As the Supreme Court has pointed out in Bruce's Juices v. American Can Co., 330 U.S. 743, 755 (1947) (dictum):

> "[N]o single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination."

It is well settled that a manufacturer may refuse to sell to a particular customer; however, if the manufacturer does sell to buyers who are competitors, he must treat them equally. Shaw's Inc. v. Wilson-Jones Co., 105 F. 2d 331 (3d Cir. 1939); Chicago Seating Co. v. Karpen & Bros., 177 F. 2d 863 (7th Cir. 1949).

Other cases have discussed the meaning of competition as used in the Act. It is most important to note that the manufacturer is not considered to be a competitor; as the Court wrote in Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1, 10 (7th Cir. 1949):

> "There is nothing in the Act that prevents a seller of a commodity from eliminating middlemen from its distributive system and selling its commodity directly to consumers if it wishes to do so; and if it chooses, it may distribute part of its commodity direct and a part through distributions."

The problem of whether a given set of transactions involves a sales relationship or an agency relationship has arisen in only a few cases. Those cases do, however, indicate that there is no special definition of sale to be applied under the Act, but that the general laws of sale apply to determine whether the relationship of the parties was that of buyer and seller.

In Students Book Co. v. Washington Law Book Co., 232 F. 2d 49 (D.C. Cir. 1955), cert. den. 350 U.S. 988 (1956), the question was whether certain book stores were consignees of the defendant publisher or were buyers from the publisher. The Circuit Court approved a charge[2] that included a definition of "sale" taken from the Uniform Sales Act § 1; see, Ill. Rev. Stat. ch. 121½, § 1 (repealed and superseded by the Uniform Commercial Code, effective July 1, 1962). This definition is:

> "A sale of goods is an agreement whereby the seller transfers the property in goods to a buyer for a consideration called the price." Uniform Sales Act § 1(2).

In a recent case brought under the Act, the Court was asked for an order determining whether one of the defendants was a purchaser from the defendant manufacturer. In denying the motion, the court held that a contested issue of fact was presented regarding whether there was a purchase; the court stated:

> "[F]or a sale to occur there must be a transfer of title. Dominion and control of the goods seems to be essential in arriving at a determination that a vendor-purchaser relationship exists.[3]

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[2] On this point, the charge to the jury was the following: "Now what is a sale and what is a consignment? A sale of goods is an agreement whereby the seller transfers the property in goods or the owner [sic] of the goods to the buyer for a consideration called the price." 232 F. 2d 49, 51, n. 7.

[3] See also, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922), where the Court said: "Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale." (At p. 354.)

• • •

"In a somewhat different context under the Robinson-Patman Act, but where the issue was the existence of a seller-purchaser relationship, the court indicated that the lack of dominion or control between the parties is the critical test in determining whether the relationship existed, and set forth many of the factors necessary to such a determination. Western Fruit Growers Sales Co. v. F.T.C., 322 F. 2d 67 (9th Cir. 1963)." Reines Distributors, Inc. v. Admiral Corp., Trade Reg. Rep. (1964 Trade Cas.) ¶ 71,047, at 79,142 (S.D.N.Y. Mar. 10, 1964).

Finally, various factors for determining whether a relationship is one of sale or of agency are set out in Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 73 (6th Cir. 1943). This case was brought by a manufacturer against its previously appointed "exclusive sales agent and representative for the State of Michigan." 135 F. 2d 73, 77, The plaintiff complained that the defendant violated its agency agreement by selling its own machinery to a customer, rather than the plaintiff's equipment. The Court found that the agreement was not an agency contract, but was a contract of sale. Certain indicia of sale were considered and applied to the transactions in question the Court stated, at page 81:

"From a consideration of the evidence and a review of the foregoing cases, we arrive at the conclusion that the contract was one of sale and not of agency. The products were bought outright from plaintiff by defendant. The latter dealt directly with its own customers in securing orders, and in delivering and installing the equipment. It billed such customers in its own name, assumed all credit risks for payment, and, having obtained full title to the goods, exercised com-

plete control over them, including installation and erection, as well as assuming all liability incidental thereto. It engaged on its own behalf in procuring business for plaintiff's products and carried on its own business for itself, and not for plaintiff."

Before applying the law to the facts, a threshold problem must be discussed. The plaintiff argues that the defendants should be estopped from denying that sales were made, because the defendants' original answers admitted that some sales had been made. The amended answers denied that any sales were made. Although the original answers are superseded as pleadings, the plaintiff can still seek to offer the original answers as admissions; however, for the Court to consider the originals as admissions, these answers must be offered into evidence, which is not the case here. IV Wigmore, Evidence, § 1067; Fruco Const. Co. v. McClelland, 192 F. 2d 241, 245 (8th Cir. 1951); Nisbet v. Van Tuyl, 224 F. 2d 66, 71 (7th Cir. 1955). Furthermore, even if the original pleading is offered into evidence, the court may still disregard it; in Decatur Coal Co. v. Clokey, 332 Ill. 253 (1928), the Court said, at pages 259-60:

> "As a matter of law, when an admission is made in a pleading at law or in chancery, if improvidently made through mistake and contrary to the actual fact, the court may, upon a proper showing, permit the pleader to change his pleading to conform to the fact."

For the above reasons, under the circumstances of this case, I hold that the defendants are not estopped from denying that sales were made by reason of their original answers.

The important facts concerning Clark's relationship with Hanson and Gleason can now be considered. The contract itself shows that the parties contemplated operation under either a vendor-vendee relationship or a principal-agent relationship, depending upon how a particular transaction was handled. The contract, then, is not determinative of the issue.

Inspecting the facts of the transactions that the defendants denominate as agency transactions, contrasted to direct sales from Clark to Gleason or Hanson, the following appear:

(a) Title to the goods never formally passed to Hanson and Gleason;

(b) Most orders were sent directly to the factory by the customer; Gleason and Hanson took almost no orders themselves and forwarded those which were sent to them to Clark;

(c) All billing was done by Clark;

(d) All credit risks were assumed by Clark; and

(e) All shipping of goods was done by Clark.

From the foregoing facts, I hold that these transactions were not sales of goods by Clark to Gleason or Hanson within the legal meaning of "sale."

Nevertheless, the plaintiff argues that it does not matter whether title passed in the technical sense. Plaintiff points out that Gleason or Hanson would receive the same amount of profit whether or not they actually took title to the goods. Plaintiff states its position as follows:

> "There is no doubt that Gleason, and later Hanson, attained 'the status of a competing purchaser under

the Act' even if they did not take title to the Clark products. They, not Clark, competed with the plaintiff, they took away plaintiff's customers by means of the lower prices Clark gave them, and they profited by the difference between the cost Clark charged them and the selling price.

"This was equally true whether the title passed through Gleason or Hanson or whether it did not, and the choice, as Hanson admitted, . . . was for him to make. Certain it is that plaintiff did not lose less money because Hanson chose in any given case, to have Clark convey the title direct to the ultimate user instead of to Hanson." (Reply Brief, pp. 12-13.)

The plaintiff further exhorts the Court to "disregard technicalities and [to] look to the substance rather than form. . . ." (Reply Brief, p. 11.)

I agree with the plaintiff that the mere form of a transaction does not determine whether the Act applies. Plaintiff has cited several cases under the Act which stand for the proposition that the Act can apply to an "indirect purchaser." The plaintiff concedes that the cases are not factually comparable with the case at bar. Moreover, an examination of the cases reveals that the quotations which the plaintiff has provided are misleading and are out of context. In K. S. Corp. v. Chemstrand Corp., 198 F. Supp. 310 (S.D.N.Y. 1961), and American News Co. v. F.T.C., 300 F. 2d 104 (2d Cir. 1962), cited by the plaintiff, the question arose whether certain purchasers that were competing with the plaintiffs purchased from the manufacturers, even though the manufacturers dealt by means of intermediaries, such as wholesalers. The Court in American News Co. v. F.T.C., supra, stated:

"If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys." 300 F. 2d 104, 109.

The contrast between these cases and the case at bar is that, in the above cases, there was no question that purchases were made; the question was from whom were the purchases made. In the case at bar, the vital question is whether Gleason and Hanson were purhasers, because it is evident that no one other than Hanson and Gleason could have received a better price than the plaintiff.

Perhaps, vis a vis the plaintiff, there is no difference whether the sales representatives were purchasers or agents; nevertheless, the relationship between Clark and the sales representatives was crucial to them. Under Clark's agreement with the sales representatives, when orders were sent to the factory, Clark was to bear and did bear all risk of loss while the goods were in transit and all risk of loss resulting from credit transactions. In these transactions, it was Clark's absolute right to control the goods. Should there be a customer complaint or a negligence suit, Clark would bear responsibility and not the sales representatives. Under these circumstances, Gleason and Hanson were not purchasers within the provisions of the Act.

Regarding the transactions that were direct sales from Clark and Hanson, it is clear that this was but a small part of the defendant's business. There is no proof in the record that two contemporaneous sales were made at discriminatory prices; therefore, the Act's requirements

have not been met, and damages cannot be founded upon these sales.

For the above reasons, the complaint must be dismissed, and the defendants granted their costs in this action.

It Is Hereby Ordered that the plaintiff's complaint be, and is, dismissed, and that costs be taxed against the plaintiff and for the defendants.

Enter:

/s/ Bernard M. Decker,
United States District Judge.

Dated: April 16, 1965.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Monday, May 2, 1966

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

LOREN SPECIALTY MFG. Co., INC., an Illinois corporation,
Plaintiff-Appellant,

No. 15299 vs.

THE CLARK MANUFACTURING COMPANY, an Ohio corporation, ROBERT F. GLEASON and ARNOLD A. HANSON,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, June 9, 1966

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

LOREN SPECIALTY MFG. CO., INC.,
Plaintiff-Appellant,

No. 15299 vs.

THE CLARK MANUFACTURING COMPANY, et al,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing of this cause be, and the same is hereby, DENIED.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 530.

LOREN SPECIALTY MFG. CO., INC.,

Petitioner,

v.

THE CLARK MANUFACTURING COMPANY,
ROBERT F. GLEASON and
ARNOLD A. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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October 31, 1966.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

NATURE OF CASE.

Petitioner, Loren Specialty Mfg. Co., Inc., asserts a violation by respondents of the Robinson-Patman Act provision which makes it unlawful:

> "to discriminate in price between different purchasers * * *." 15 U. S. C. 13(a).

Both courts below, Judge Decker in the United States District Court in Chicago, 241 F. Supp. 493, and Judges Hastings, Duffy, and Schnackenberg in the Court of Appeals for the Seventh Circuit, 360 F. 2d 913, found against petitioner on the facts.

QUESTION PRESENTED.

The only question this case presents is:

> Whether the two courts below correctly found on the facts that respondents did not "discriminate in price between different purchasers * * *."

The case turns on a question of fact on which the two courts below concurred, correctly, as respondent believes, for reasons that will be apparent from—

THE STATEMENT OF FACTS.

Petitioner, Loren Specialty Mfg. Co., Inc., was for 10 years the exclusive Chicago-area distributor of steam specialties (such as valves, traps and like products) for respondent, The Clark Manufacturing Company. (Finding 1, A. 424.)[1]

During that period the sales of Clark products in the Chicago area *dropped 39%* (A. 328) (while industries in that area requiring such products were expanding vastly). (A. 329.) At the same time, Clark's national sales (outside of Chicago) *increased 19%*. (A. 328; 360 F. 2d at 914.)

Clark concluded it must change its method of distribution in Chicago. (A. 330-331.) It decided it could no longer rely on a single exclusive distributor. It decided to turn to a distribution system utilizing numerous non-exclusive distributors. (A. 331.) Loren was unwilling to organize such a system. (A. 342-344, 357-358.) Clark, therefore, appointed respondent Gleason (succeeded later

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[1] References designated A are to pages of the Appendix lodged in the Court of Appeals and certified here; references to Opinion are to the opinion of the District Court, references to the opinion of the Court of Appeals are to the opinion reported in 360 F. 2d 913.

by respondent Hanson) to operate as a factory representative to set up a series of non-exclusive distributors. (Findings 4-8, A. 425-426, 330-331, 345.) This, it is conceded, Clark had the right to do. (A. 362.)

When the new system was set up, petitioner Loren no longer enjoyed the exclusive distributor discount. (Findings 12-13, A. 427-428; 360 F. 2d at 914.) It agreed, however, to continue as a non-exclusive distributor. (Finding 3, A. 425.) And it received the same discount as every other non-exclusive distributor, and, as both courts below found, no purchaser received a greater discount, or a better price. (Opinion, A. 435, 131-132; 360 F. 2d at 914.)

With its former monopoly position of exclusive distributor gone (A. 269, 296), and its business in Clark products divided with other non-exclusive distributors (A. 190), Loren, dissatisfied, claimed that Gleason (and later Hanson) were purchasers at discriminatory prices—resulting in a violation of the Robinson-Patman Act. (260 F. 2d at 914.)

Both courts below found there was no sale of products to Gleason for resale, or, after him, Hanson. (Findings 9-11, A. 427; Opinion, A. 433; 360 F. 2d at 914.) There was simply a change in the distribution system. Hence, Gleason, and later, Hanson, were not "purchasers" of products. They were factory representatives merely; they bought no products for resale. (Findings 7-11, A. 426-427; Opinion, A. 435; 360 F. 2d at 914.) Accordingly (because there were *no sales to different purchasers at different prices*) there could be no violation of the Robinson-Patman Act.

The District Court found, on the facts:

> "these transactions were not sales of goods * * *." (Opinion, 433.)

The Court of Appeals agreed, and pointed out (as had the District Court) that:

> "No one purchaser was given a lower price." 360 F. 2d at 914.

That is all there is to petitioner's case.

Accordingly,—

NO BASIS FOR REVIEW IS SHOWN.

Petitioner presents no question of law.

The case turns solely on a question of fact. The Court of Appeals correctly summed up the issue in this manner:

> "The district court found that they [Gleason and Hanson] were not purchasers within the provisions of the Act. Under 28 U. S. C. A. rule 52(a), we are prevented from disturbing this finding, even if we believe it erroneous, which we do not. The sanction of 15 U. S. C. A. § 13(a) is directed against discrimination in price *between different purchasers.*" (The emphasis is the court's.) 360 F. 2d at 914.

CONCLUSION.

The writ should be denied.

Respectfully submitted,

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